



NH v Lenford: one further step in the continuing evolution of sexual orientation non-discrimination rights before the European Union

Article

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***NH v Lenford*: One Further Step in the Continuing Evolution of Sexual Orientation Non-Discrimination Rights Before the European Union**

Dr Frances Hamilton*

Table of contents:

1. Introduction. – 2. Past Treatment of LGBT Persons before the CJEU. – 3. Increased Legislative Competencies of the European Union Institutions Leading to More Rights for LGBT Persons. – 4. Is there a hierarchy of protected characteristics before the CJEU? – 5. *NH v Lenford*: CJEU Adopting an Expansive Purposive Approach. – 6. *NH v Lenford*: Dealing with the Freedom of Expression Argument. – 7. Case law analysis demonstrating more restrictive interpretations of non-discrimination law by the Court of Justice of the European Union ('CJEU'). – 8. CJEU judgments resulting in favourable outcomes for LGBT persons. – 9. *NH v Lenford*: One step further towards levelling the hierarchy of protected rights. – 10 Brexit and Trade and Cooperation Agreement. – 11. Conclusion.

Abstract

The facts of NH v Lenford concerned statements made by a senior lawyer in a radio interview, which suggested that he would never hire a gay person to work in his law firm, nor wish to use the services of such a person. The Court of Justice of the European Union ('CJEU') determined that this contravened relevant legislation prohibiting discrimination in employment, even though the statements were made without a recruitment procedure being underway. The CJEU and the Italian Court of Cassation when implementing the CJEU judgment both found that the person making such statements was influential on the firm's recruitment policy and that compensation was payable to the applicants – the Associazione Avvocatura per i diritti LGBTI (the 'Associazione'), a non-profit recognizes In representing the general interest of LGBT lawyers – even in the absence of an individual victim. Contrary to the suggestion of other authors, that sexual orientation discrimination is low down the hierarchy of protected characteristics before the EU legislation and CJEU, this article argues that NH v Lenford demonstrates a further step in the continuing evolution of LGBT non-discrimination rights before the European Union. Following Brexit whilst existing EU laws already translated into the UK legislative cannon will be retained, further EU legislation and rulings from the CJEU will not apply to the UK. The Trade and Cooperation Agreement ('TCA') reached between the UK and EU includes protection of human rights, a 'non-regression' and re-balancing clauses with regards to labour and social policy, and thus, enables the EU and UK continuing, albeit limited, influence on each other.

1. Introduction

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NH v Lenford concerned a request to the Court of Justice of the European Union ('CJEU') for a preliminary ruling from the Italian Corte Suprema di Cassazione (Supreme Court of Cassation, Italy)¹. The case was brought by a legal entity, the Associazione Avvocatura per i diritti LGBTI (*the 'Associazione'*), representing the collective interest of LGBT (this acronym is used here for functional purposes to refer to lesbian, gay, bisexual and trans) lawyers. They complained that statements made by a senior lawyer, NH, in a radio programme which suggested that the solicitors' firm where he worked would never hire or use the services of gay persons contravened relevant EU non-discrimination provisions against LGBT persons². The CJEU had to determine whether statements made during the course of a radio interview fell within relevant EU protections, even though the statements were made at a time when no current or planned recruitment procedures were ongoing³. A further question to be addressed was whether the Associazione could bring a case representing LGBT persons, even though there were no individual named victims in the case. The CJEU adopted a purposive interpretation of EU law to determine both answers in the affirmative⁴. Of relevance was the fact that the statements were made by a person perceived to have influence on recruitment policy, which could prejudice applicants in deciding against future job applications⁵. In allowing compensation to be payable to a third-party representative organisation, in the absence of individual named victims, this meant that cases could be brought forwards, without needing for individuals to 'out' themselves. The Italian Court of Cassation applied the preliminary ruling to allow the representative organisation to bring the action on behalf of its constituent members⁶. They also found that statements fell within the material scope of Directive 2000/78⁷ and that there was sufficient link between the statements made and the employer⁸.

The next section analyses how historically the EU, constrained by a lack of competence to act, demonstrated much self-restraint towards developing LGBT discrimination cases and adopted a conservative approach. This led to authors considering that the CJEU had stopped moving forward in this area⁹, or that a hierarchy of protected rights exists¹⁰, with LGBT persons either not

¹ European Court of Justice, Grand Chamber, April 23rd 2020, Case C-507/18 *NH v. Associazione Avvocatura per i Diritti LGBTI – Rete Lenford* ('NH v Lenford').

² Directive 2000/78/EC establishing a General Framework for Equal treatment in Employment and Occupation Prohibiting Discrimination on the Grounds of Religion or Belief, Disability, Age and Sexual Orientation.

³ Of most relevance was Article 3 of Directive 2000/78 (*Ibid.*) which provides that Article 3 "Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to: (a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;(b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience; (c) employment and working conditions, including dismissals and pay; (d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations".

⁴ *NH v Lenford* (n1).

⁵ *Ibid.*

⁶ Italian Court of Cassation, Section I Civil Ordinance 15 December 2020, n. 28646 at paragraphs 2.4.1 - 2.4.4.

⁷ *Ibid.* para 5.6.

⁸ *Ibid.* para 5.8.

⁹ E. Howard, S. Benedi Lahuerta and A. Zbyszewska, 'EU Anti-Discrimination Law: Has the CJEU Stopped Moving Forward?' *International Journal of Discrimination and the Law* 2018-06, Vol 18 (2-3) p. 60 – 81.

¹⁰ See *Ibid.*

protected¹¹, or less well protected from discrimination¹². In further sections the author sets forward the argument that although much work remains to be done, *NH v Lenford* is a case example demonstrating the continuing evolution of LGBT non-discrimination rights at EU level¹³. This has been done through a series of new legislative tools which include the EU Charter of Fundamental Rights¹⁴, through expanding protection from discrimination in employment law legislation¹⁵, and through case law of the CJEU in the area of free movement, where the Court has interpreted the term 'spouse' to include the same-sex spouse of a Union citizen for the purpose of granting family reunification rights under EU law¹⁶. As a British author, the article also contains consideration of the position following Brexit. For a wider audience the points are also relevant as they illustrate how far EU legislation and CJEU judgments have forced Member States to protect LGBT rights. Following Brexit, new EU legislation and judgments from the CJEU will no longer take automatic effect in the UK. The Trade and Cooperation Agreement ('TCA') commits the UK and the EU to upholding 'shared values, principles of democracy and a respect for human rights...' ¹⁷ a non-regression clause in relation to existing labour law, including fundamental rights at work¹⁸ as well as potential 'rebalancing' provisions in the area of labour law between the EU and UK¹⁹. As discussed in the final section, in some limited extent, this may allow the opportunity for the EU and the UK to continue to influence each other in the area of LGBT non-discrimination law. However, the author suggests that the required hurdles of effect on 'trade or investment between the parties'²⁰ as regards non-regression, and 'significant divergence' in labour law leading to a 'material impact on trade or investment' as regards rebalancing²¹, will be very difficult tests to meet in practice.

2. Past Treatment of LGBT Persons before the CJEU

¹¹ See for example, European Court of Justice, Grand Chamber, February 17th 1998, Case C-249/96, *Grant v. South West Trains*, (1998) 1 CMLR 993.

¹² For example see European Court of Justice, Grand Chamber, January 7th 2004, Case 117/ 01 *KB v NHS Pensions Agency*.

¹³ See *NH v Lenford* (n1).

¹⁴ EU Charter of Fundamental Human Rights of the European Union.

¹⁵ See for example Directive 2000/43/EC prohibiting racial and ethnic origin discrimination and Directive 2000/78/EC,2 establishing a general framework for equal treatment in employment and occupation prohibiting discrimination on the grounds of religion or belief, disability, age and sexual orientation.

¹⁶ European Court of Justice, Grand Chamber, June 5th 2018, Case C-673/16 *Relu Coman and Others v. Inspectoratul General pentru Imigrari and Others*.

¹⁷ Trade and Cooperation Agreement, TITLE II: BASIS FOR COOPERATION Article COMPROV.4: Democracy, rule of law and human rights 1. The Parties shall continue to uphold the shared values and principles of democracy, the rule of law, and respect for human rights, which underpin their domestic and international policies. In that regard, the Parties reaffirm their respect for the Universal Declaration of Human Rights and the international human rights treaties to which they are parties.

¹⁸ Trade and Cooperation Agreement, Title XI: Level Playing Field for Open and Fair Competition and Sustainable Development Art 6.1 applies to 'labour and social levels of protection' which under Art 6.2 'non-regression clause both parties agree not to 'weaken or reduce, in a manner affecting trade or investment between the parties...'

¹⁹ Trade and Cooperation Agreement Article 9.4 Rebalancing.

²⁰ Article 6.2: Non-regression from levels of protection para 2.

²¹ Trade and Cooperation Agreement Article 9.4 Rebalancing.

EU protection of LGBT persons from discrimination evolved by EU legislation increasing competences across human rights and discrimination law and subsequent purposive interpretation by the CJEU²². In the past CJEU case law determined that sexual orientation would not fall within a sex discrimination ground²³. This meant as Howard sets out that ‘the EU did not have the competence to act against discrimination on the wider grounds beyond sex discrimination...’²⁴ In addition, where free movement of persons was concerned, only traditional family formats were recognised within the scope of family life as defined by EU legislation²⁵. As a result, prior to recent case law²⁶, non-EU national same-sex spouses could not relocate with their EU citizen spouse to an EU country which did not recognise their union²⁷. Subsidiarity was protected, which meant that gender neutrality of the word ‘spouse’ was never considered by EU institutions²⁸, thereby arguably meaning that free movement was not given its most extensive interpretation²⁹. Being denied the status of ‘family member’³⁰ also led to being denied the ‘plethora of benefits’³¹ normally accorded to the family members of EU citizens. This included a wide-ranging panoply of rights, ranging from residence³², protection from non-discrimination, and access to social assistance schemes³³ and schooling³⁴. The division of competencies between the EU and Member States meant (and still means) that Member States were free to determine their own policy with regards to family law, including whether or not to legalise same-sex unions. In *KB*, the CJEU confirmed that pensions came within pay and the remit of relevant national legislation under Art 141 EC³⁵.

²² See n. 14 – 16.

²³ See, for example, Case C-249/96 *Grant v. South West Trains*, (n11). This decision was heavily criticized. For discussion. see D. Kochenov, ‘On Options of Citizens and Moral Choices of States: Gays and European Federalism’ *Fordham International Law Review* 2009 Vol 33(1) p.156 at p.175 referring to N. Bamforth, ‘Sexual Orientation Discrimination after *Grant v South-West Trains*,’ *Modern Law Review* 2000 Vol 63 at p.720.

²⁴ Howard (n9) at p.61.

²⁵ Whilst Citizenship Directive 2004/38 Article (2(2)) included registered partners amongst family members, this was only strictly ‘on the basis of the legislation of a Member State if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State.’ Commentary on Article 9 of the Charter of Fundamental Rights of the European Union provides that ‘[t]here is, however, no explicit requirement that domestic laws should facilitate such marriages. International courts and committees have so far hesitated to extend the application of the right to marry to same-sex couples...’

²⁶ *Relu Coman and Others v. Inspectoratul General pentru Imigrari and Others* (n16).

²⁷ See *Ibid.*

²⁸ D. Kochenov, ‘On Options of Citizens and Moral Choice of States: Gays and European Federalism, 33(1) *Fordham International Law Review* (n.23) 2009 Vol 33(1) p.156 at p.190.

²⁹ See *Ibid.*

³⁰ Citizenship Directive 2004/38.

³¹ See for discussion H. Stalford, ‘Concepts of Family Under EU Law – lessons from the ECHR’ *International Journal of Law Policy and the Family* 2002 Vol 16(3) p.410 at p.427.

³² Citizenship Directive 2004/38 article 14 (1).

³³ Citizenship Directive 2004/38 Article 14(3).

³⁴ Art 10 Regulation 492/2011. Also see European Court of Justice, Grand Chamber, July 3rd 1974, Case C-9/74 *Casagrande*.

³⁵ Article 141 EC provides: 1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied. 2. For the purpose of this Article, pay means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer....’ See, in particular, European Court of Justice, Grand Chamber, May 17th 1990, Case C-262/88 *Barber* [1990] ECR I-1889, paragraph 28, and European Court of Justice, Grand Chamber, September 12th 2002 Case C-351/00 *Niemi* [2002] ECR I-7007 at paragraph 40).

However with regards to transpersons the CJEU made a clear statement that 'it is for the Member States to determine the conditions under which legal recognition is given to the change of gender of a person'³⁶. This followed the approach of the European Court of Human Rights ('EctHR') in *Goodwin v United Kingdom*³⁷. The law at the time in the UK did not recognize change of gender. A heterosexual couple, where one partner's sex resulted from a change of gender, were therefore precluded from gaining the right as beneficiary as a survivor to the pension, with no protection being given from EU law³⁸. The case would be decided differently today in the UK, following change of legislation in the UK to recognize gender change if conditions are met³⁹.

3. Increased Legislative Competencies of the European Union Institutions Leading to More Rights for LGBT Persons

This article argues that the historically restrictive attitude of the CJEU towards LGBT persons is in the process of evolution. The driving force behind this is that the competencies of the EU to act have been enlarged by legislation. The EU has adopted the Charter of the Fundamental Rights ('EUCFR') at art 21(1) which includes same-sex orientation as a protected non-discrimination ground⁴⁰. There is also growing closeness between the EU and the Council of Europe as demonstrated by instances of judicial borrowing between the two institutions⁴¹. The EU requires compliance with human rights as part of its accession criteria and two institutions have been described as 'natural partners'⁴². In addition, article 19 TFEU – introduced in 1999 – has also functioned as the legal basis for the adoption of measures to 'combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'⁴³.

European Union (EU) Directives adopting more detailed legislation against discrimination include Directive 2000/43/EC, prohibiting racial and ethnic origin discrimination, and Directive 2000/78/EC, establishing a general framework for equal treatment in employment and occupation prohibiting discrimination on the grounds of religion or belief, disability, age and sexual

³⁶See *KB* (n12).

³⁷*Ibid.* Para 35 referring to European Court of Human Rights, July 11th 2012, App. No. 28957/95. *Goodwin v United Kingdom*.

³⁸See *KB* (n12).

³⁹Gender Recognition Act 2004.

⁴⁰EU Charter of Fundamental Rights.

⁴¹See J. Gerards, 'The Prism of Fundamental Rights' 8 *European Constitutional Law Review* 2012 Vol 8 at p.192.

⁴²The European Parliamentary Assembly (1999) Building Greater Europe Without Dividing Lines' (Opinion on the Report of the Committee of Wise Persons) 15 Opinion No. 208. See also T. Joris and J. Vandenberghe, 'The Council of Europe and the European Union: Natural Partners or Uneasy Bedfellows?' *Colum J Eur L* (2008-2009) Vol 15 p.1, at p.3 argue that they are increasingly active in the same fields and should therefore, according to the European Parliamentary Assembly, not waste resources. See European Parliamentary Assembly (2002) 'The Council of Europe and the New Issues Involved in Building Europe' Recommendation No. 1578 at para 4. See also R. Wintemute, 'In Extending Human Rights, which European Court is Substantively "Braver" and Procedurally "Fitter"?' The Example of Sexual Orientation and Gender Identity Discrimination' in S. Morano-Foadi and L. Vickers (eds), *Fundamental Rights in the EU: A Matter for Two Courts*, London, Hart, 2015.

⁴³Article 19 Treaty on the Functioning of the European Union.

orientation⁴⁴. Whilst Directive 2000/78/EC did not demand ‘final harmonisation... the adoption of the Directive meant that all Member States ... had to amend existing laws...’⁴⁵ Although the new Directive did not ‘arrive in a vacuum,’ the then existing 15 member states had huge variations and ‘all kinds of laws – and social attitudes – about sexual orientation’ discrimination in employment law⁴⁶. Eight member states had to make additions or changes to their laws, whereas Italy and the UK were both member states who needed to make provisions against sexual orientation discrimination in employment law for the first time. Italian law implemented Directive 2000/78 for equal treatment in employment by means of Legislative Decree No 216 and Occupation of 9 July 2003. Numerous pieces of UK legislation implemented EU directives in this area, with the most relevant being the Employment Equality (Sexual Orientation) Regulations⁴⁷. These have since been consolidated into the Equality Act 2010⁴⁸.

The possibilities for the EU with regard to interpreting non-discrimination provisions in favour of LGBT persons was demonstrated early on by the *Maruko* case⁴⁹. This considered access of a surviving LGBT partner to an occupational pension scheme managed by the *Versorgungsanstalt der deutschen Bühnen* (German theatre company pension organisation). The CJEU stressed the wide remit of Article 2 of Directive 2000/78 which provided that the principle of equal treatment covered both direct and indirect discrimination. Direct discrimination included the situation where overtly ‘one person is treated less favorably than another is, has been or would be treated in a comparable situation [whilst] [t]here is indirect discrimination when an apparently neutral provision’ can ‘disadvantage persons, including those of a particular sexual tendency’⁵⁰. The CJEU found that Directive 2000/78 ‘precluded legislation such as that at issue in the main proceedings under which, after the death of his life partner, the surviving partner does not receive a survivor’s benefit equivalent to that granted to a surviving spouse...’⁵¹ Due regard was paid to member states’ competencies as ‘it was for the referring court to determine whether a surviving life partner is in a situation comparable to that of a spouse who is entitled to the survivor’s benefit...’⁵² As Germany had enacted legislation on registered partnerships⁵³, the surviving partner in *Maruko* was therefore

⁴⁴ Directive 2000/43/EC, 1 prohibiting racial and ethnic origin discrimination and Directive 2000/78/EC, 2 establishing a general framework for equal treatment in employment and occupation prohibiting discrimination on the grounds of religion or belief, disability, age and sexual orientation.

⁴⁵ K. Waaldijk, ‘Legislation in Fifteen EU Member States Against Sexual Orientation Discrimination in Employment: the Implementation of Directive 2000/78/EC’ Leiden, Institute of Public Law, University of Leiden, 2006 available at https://openaccess.leidenuniv.nl/bitstream/handle/1887/5217/6_170_056.pdf;jsessionid=F8FFB9AEC444AD0F236732560194582E?sequence=1 at p.17-p.18.

⁴⁶ See *Ibid.*

⁴⁷ The main UK laws implementing EU laws into the UK include; the Employment Equality (Religion or Belief) Regulations 2003; the Employment Equality (Sexual Orientation) Regulations 2003 and the Employment Equality (Age) Regulations 2006 now all consolidated in the Equality Act 2010.

⁴⁸ Equality Act 2010.

⁴⁹ European Court of Justice, Grand Chamber, April 1st 2008, Case C 267/06 *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen*.

⁵⁰ See *Ibid* para 2.

⁵¹ See *Ibid.* para 27.

⁵² *Ibid.* Para 69. This was confirmed in the case of European Court of Justice, Grand Chamber, May 10th 2011, C-147/08 *Jürgen Römer v Freie und Hansestadt Hamburg* but in this case the CJEU went further and carried out the comparability assessment themselves.

⁵³ (Gesetz über die Eingetragene Lebenspartnerschaft) of 16 February 2001 (BGBl. 2001 I, p. 266), as amended by the 78 I - 1794 JUDGMENT OF 1. 4. 2008 — CASE C-267/06 Law of 15 December 2004 (BGBl. 2004 I, p. 3396,

able to benefit from a survivor's pension, but this was of no assistance to LGBT persons in other Member States that did not have domestic legislation enabling them to formalize their relationship.

4. Is there a hierarchy of protected characteristics before the CJEU?

It is a subject of academic debate as to how progressive the CJEU has been in the development of LGBT rights. Some authors, such as Howard, have argued that two equality Directives introduced in 2000 (Dir. 2000/78 and Dir. 2000/43)⁵⁴ have not led to the same level of protection⁵⁵. She discusses the literature on these grounds and concludes that there is a '...hierarchy of discrimination grounds...'⁵⁶ Ultimately on this argument the prohibitions against sexual orientation discrimination are not as strong as those preventing other types of discrimination. The justification behind the argument as to the existence of a hierarchy of rights is threefold and involves comparisons between the two Directives⁵⁷. It is argued on this basis that the Directive relating to religion, belief, disability, age and sexual orientation⁵⁸ (Directive 2000/78) only relates to employment (defined under its article 3 as including access to employment, employment and working conditions, vocational guidance and training and affiliation and activity)⁵⁹ whereas the Directive concerning race or ethnic origin⁶⁰ (Directive 2000/43) is much wider and not so restricted in scope⁶¹. Secondly, whilst the latter instrument obliges Member States to set up bodies providing for equal treatment, there is no corresponding requirement in Directive 2000/78 for persons discriminated against on the other grounds, although many EU states have introduced such bodies anyway⁶². Thirdly the Directive concerning race and ethnic origin (Dir. 2000/43)⁶³, only allows discrimination to be justified in 'two explicitly specified circumstances'⁶⁴, whereas when considering the directive concerning, inter alia, religion and sexual orientation (Dir. 2000/78)⁶⁵,

the 'LPartG'), provides: '(1) Two persons of the same sex establish a partnership when they each declare, in person and in the presence of the other, that they wish to live together in partnership for life (as life partners). The declarations cannot be made conditionally or for a fixed period. Declarations are effective when they are made before the competent authority.

⁵⁴ Directive 2000/43/EC, 1 prohibiting racial and ethnic origin discrimination and Directive 2000/78/EC, 2 establishing a general framework for equal treatment in employment and occupation prohibiting discrimination on the grounds of religion or belief, disability, age and sexual orientation.

⁵⁵ Howard (n9).

⁵⁶ Howard (n9) at p.61.

⁵⁷ Howard (n9).

⁵⁸ Directive 2000/78/EC, 2 establishing a general framework for equal treatment in employment and occupation prohibiting discrimination on the grounds of religion or belief, disability, age and sexual orientation.

⁵⁹ Directive 2000/78 Art 3. See, U. Belavusau, 'A Penalty Card for Homophobia from EU Non-discrimination Law: Comment on *Asociația Accept (C-8/12)*', *Columbia Journal of European Law* (2015) Vol 21 at p.353; A. Tryfonidou, 'Discrimination on the Grounds of Sexual Orientation and Gender Identity', in S. Vogenauer and S. Weatherill (Eds.), *General Principles of Law: European and Comparative Perspectives* London, Hart, 2017 p.386–p.387.

⁶⁰ Directive 2000/43/EC, 1 prohibiting racial and ethnic origin discrimination.

⁶¹ Howard (n9) at p.62.

⁶² Howard (n9) p.62 referring to I. Chopin and C. Germaine, 'A Comparative Analysis of Non-discrimination Law in Europe 2017', *European Network of Legal Experts in the Non-discrimination Field* Luxembourg: Publications Office of the European Union, 2017 p. 108– p.114, available at <https://www.equalitylaw.eu/downloads/4489-a-comparative-analysis-of-non-discriminationlaw-in-europe-2017-pdf-1-35-mb>.

⁶³ Directive 2000/43/EC.

⁶⁴ Genuine and determining occupational requirements (Article 4) and positive action (Article 5).

⁶⁵ Directive 2000/78/EC, 2.

not only are these two grounds given but also other justifications for direct discrimination are allowed including based on religion or belief⁶⁶. Howard's analysis⁶⁷ provides a lens for consideration of the CJEU judgment in *NH v Lenford*⁶⁸. Scrutiny is given as to whether the case demonstrates the CJEU operating a hierarchy of discrimination grounds and if so whether sexual orientation discrimination is still being treated less favourably.

5. *NH v Lenford*: CJEU Adopting an Expansive Purposive Approach

In *NH v Lenford* the CJEU adopted an expansive purposive interpretation of relevant legislation. Following the earlier case of *Asociația Accept*⁶⁹ the CJEU had to consider the extent of non-discrimination provisions contained in EU law on the basis of sexual orientation applied in the context of employment law. Reference was made to the EUCFHR Article 15 which includes 'Freedom to choose an occupation and right to engage in work'⁷⁰. The CJEU stressed that these rights had to be enjoyed in a non-discriminatory manner⁷¹. The CJEU drew attention to Recitals 9, 11, 12, and 28 of Directive 2000/78 which emphasise that 'employment and occupation are key elements in guaranteeing equal opportunities for all and contribute strongly to the full participation of citizens in economic, cultural and social life and to realising their potential...'⁷² The CJEU documented their purposive approach by stating the reasons behind why these provisions were in place. This was because '[d]iscrimination based on ...sexual orientation may undermine the achievement of the objectives of the TFEU Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity and the free movement of persons...'⁷³ The CJEU also made reference to the wide interpretation of what was meant by discrimination to include direct and indirect discrimination⁷⁴.

Of key relevant consideration in *NH v Lenford* was the scope of the directive and whether this would include statements made outside of a recruitment programme and during the course of a radio interview. Here, paragraph 3 of Directive 2000/78 was identified as being most relevant. This states the scope of the Directive relates to all '...conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions...' ⁷⁵ Statements made in a radio interview were held to be included. The CJEU again took a purposive

⁶⁶ (Under Directive 2000/78/EC, direct discrimination can be justified for the same reasons (Articles 4(1) and 7, respectively), but other justifications are also provided for. There is an exception for churches and other organizations with an ethos based on religion or belief (Article 4(2)); reasonable accommodation must be made for people with a disability (Article 5); direct discrimination on the ground of age can be justified in a number of situations (Article 6); and Article 2(5) contains a general justification clause.

⁶⁷ Howard (n9).

⁶⁸ *NH v Lenford* (n1).

⁶⁹ European Court of Justice, Grand Chamber, April 25th 2013, Case C-81/12 *Asociația Accept*.

⁷⁰ EUCFHR Article 15.

⁷¹ Article 21 EUCFHR.

⁷² Howard (n9) at p.62.

⁷³ *NH v Lenford* (n1) paragraph 6 referring to Recital 9 of Directive 2000/78

⁷⁴ *NH v Lenford* (n1) paragraph 8 referring to Paragraph 2 of Directive 2000/78.

⁷⁵ Directive 2000/78 paragraph 3.

approach, having regard to the ‘objectives...’ which Directive 2000/78 seeks to safeguard⁷⁶. The CJEU determined that the ‘non-existence of a current or planned recruitment procedure [was] not decisive...’⁷⁷ In so doing they reinforced their earlier decision in *Asociația Accept* ruling⁷⁸. That case had concerned anti-gay statements given to the media by a leading personality in the context of potential recruitment to a Romanian football team. These were found to contravene EU discrimination law, a decision described as a positive advance for gay rights before the CJEU⁷⁹. The Italian Court of Cassation in implementing the preliminary ruling from the CJEU also determined that statements made in the course of a radio interview fell within Directive 2000/78⁸⁰.

Interpreting relevant legislation⁸¹, the CJEU upheld the earlier judgments of the Bergamo District Court and the Court of Appeal Brescia which determined that the Associazione could bring the claim as a non-profit representative agency, even in the absence of a named victim. This followed the CJEU’s earlier determination in *Asociația Accept*, which also did not involve an individual victim.⁸² In so doing the CJEU offered a purposive and extensive interpretation of relevant EU law, without which, the legislation would have had far less effect. If an individual victim was required to be named, this would have meant ‘outing’ the individual with all the attendant publicity and potential negative impact from their existing employers. This was also implemented by the Italian Court of Cassation.⁸³

In *NH v Lenford*, anti-gay statements made to the media, outside of a recruitment procedure, were also seen as relevant ‘conditions for access of employment’ within the scope of Article 3 Directive.⁸⁴ The CJEU stressed that what was of importance was the pre-selection of the applicants themselves in determining whether or not to apply for a job⁸⁵. The CJEU followed closely Advocate General Sharpston’s Opinion, where she had considered that often the ‘greatest force in an employment decision is the applicant’s decision to apply’⁸⁶. An additional issue in the case in hand, was that following the radio interview ‘the employer did not clearly distance itself from the statements concerned...’⁸⁷ The CJEU looked carefully at the factors which would establish whether there was a sufficient ‘link’ between the statements made in the radio interview and the employment opportunities. Close reference was made to Advocate General Sharpston’s Opinion⁸⁸. Relevant categories in consideration of establishing a link included consideration of the ‘status of

⁷⁶ *NH v Lenford* (n1) paragraph 34.

⁷⁷ *NH v Lenford* (n1) paragraph 43.

⁷⁸ *Asociația Accept* (n69).

⁷⁹ See, U. Belavusau, ‘A Penalty Card for Homophobia from EU Non-discrimination Law: Comment on *Asociația Accept* (C-8/12)’, *Columbia Journal of European Law* 2015 Vol 33 at p.353; A. Tryfonidou, ‘Discrimination on the Grounds of Sexual Orientation and Gender Identity’, in S. Vogenauer and S. Weatherill (Eds.), *General Principles of Law: European and Comparative Perspectives*, London, Hart, 2017, p386–p.387.

⁸⁰ Italian Court of Cassation, Section I Civil Ordinance 15 December 2020, n. 28646.

⁸¹ Commission Recommendation 2013/394/EU of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (OJ 2013 L 201, at 60) ‘Towards a European Horizontal Framework for Collective Redress.’

⁸² *Asociația Accept* (n69).

⁸³ Italian Court of Cassation, Section I Civil Ordinance 15 December 2020, n. 28646 n6.

⁸⁴ Directive 2000/78 paragraph 3.

⁸⁵ *NH v Lenford* (n1) paragraph 40.

⁸⁶ Advocate General Sharpston’s Opinion in *NH v Lenford* (n1) paragraph 65 to 69.

⁸⁷ *NH v Lenford* (n1) paragraph 43.

⁸⁸ *NH v Lenford* (n1) paragraph 40 referring to paragraph 53 to 56 Advocate General Sharpston’s Opinion.

the person making the statements, ...the capacity in which he or she made them, establish[ment] of... he or she as a potential employer or is, in law or in fact, capable of exerting a decisive influence on the recruitment policy... or, at the very least, may be perceived by the public of the social groups concerned as being capable of exerting such influence, even if he or she does not have the legal capacity to define the recruitment policy of the employer concerned or bind or represent that employer in recruitment matters...'⁸⁹ In *NH v Lenford* the CJEU determined that there was a sufficient link because the statement was made by a senior member of staff. The CJEU concluded that if firms could avoid liability for words made in interview because they 'allegedly constitute the expression of a personal opinion... the very essence of the protection afforded by that directive in matter of employment and occupation would become illusory'⁹⁰. In so doing the CJEU endorsed AG Sharpston's opinion, that 'offhand remarks, particularly those which claim to be purely opinions, or humorous, [could] constitute discrimination...'⁹¹ As Powell comments, the CJEU following AG Sharpston '...reject[ed] emphatically the proposition that a 'humorous' discriminatory statement somehow 'does not count' or is acceptable. Humour is a powerful instrument and can all too easily be abused'⁹².

In determining the discretion left to them following the preliminary ruling, the Italian Court of Cassation found a link between the statements made and the employer because of the status of the person making the statement which 'configures him as a potential employer' together with 'the nature and content of the declarations in questions,... which must refer to the conditions of access to employment and work and demonstrate the intention to discriminate, and finally, the context in which the declarations have been made, in particular their public or private character, and also the fact that they have been disseminated to the public...'⁹³ The Italian Court of Cassation concluded that the connection of the lawyer Taormina with the firm in question was not 'merely hypothetical...' [as] '[i]n fact, he was the owner of such a firm and practiced the legal profession and therefore was potentially a possible employer and contractor of collaborators'⁹⁴.

6. *NH v Lenford* Dealing with the Freedom of Expression Argument

In *NH v Lenford*, the CJEU had to interpret various conflicting provisions under EU law. An important consideration in relation to statements made in a radio interview were the guarantees under the European Union's Charter of Fundamental Human Rights ('EUCFHR'). Article 11 guarantees the right to freedom of expression. This right includes 'freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless

⁸⁹ *NH v Lenford* (n1) paragraph 44.

⁹⁰ *NH v Lenford* (n1) paragraph 54.

⁹¹ C. Powell, *Discrimination Law Association Briefings* March 2020 Vol 69 at p925.

⁹² Advocate General Sharpston's Opinion as discussed by Claire Powell *Discrimination Law Association Briefings* 925 March 2020 Vol 69.

⁹³ Italian Court of Cassation, Section I Civil Ordinance 15 December 2020, n. 28646 (n6) at para 5.7 judgment

⁹⁴ *Ibid.* para 5.8.

of frontiers...'⁹⁵ Freedom of expression is also guaranteed under the Italian constitution⁹⁶. This was of crucial importance to the *NH v Lenford* case as the lawyer argued that the statements made were part of the exercise of freedom of expression by the lawyer in question, guaranteed by the Italian constitution⁹⁷. The Court of Cassation in implementing the preliminary ruling received back from the CJEU in *NH v Lenford* emphasized statements made by the CJEU which recognizes that 'freedom of expression [is] considered an essential foundation of a democratic and pluralist society reflecting the values on which the Union is founded, pursuant to art 2 TEU and art 11 of the Charter'⁹⁸. The CJEU found that homophobic speech of the lawyer NH fell within Article 11, but had to be balanced against other rights protected by the Charter⁹⁹. The Italian Court of Cassation also followed a similar approach, referring to the principle of proportionality and that freedom of expression had to be balanced against other rights, in this case protection from discrimination on the prohibited grounds listed. Ultimately, the Italian Court of Cassation concluded that such restrictions on freedom of expression could be justified in order to guarantee the employment rights of those with protected characteristics, such as LGBT persons in the case under consideration¹⁰⁰.

It remains debatable as to whether balancing freedom of expression and protection of labour rights has struck the right approach. It can be argued that the approach taken by the CJEU and the Italian Court of Cassation does not go far enough. Tryfonidou suggests that NH's comments amounted to 'hate speech' and should not have been held to fall within the remit of Article 11 at all¹⁰¹. Tryfonidou argues that the approach currently taken '...seems to imply that freedom to engage in homophobic speech needs to be protected as an aspect of the freedom of expression which means that it can be deemed acceptable under certain circumstances...'¹⁰² Yet, in finding the speech fell within Article 11 but balancing this against other rights protected in the EUCFHR, the CJEU is following the approach of EctHR case law. The EctHR often finds that extreme speech falls within free speech grounds¹⁰³, but considers restrictions in an exercise known as the proportionality balancing exercise¹⁰⁴.

⁹⁵ EU Charter of Fundamental Human Rights states that 'Everyone has the right to freedom of expression. This right shall include freedom to hold opinion and to receive and impart information and ideas without interference by public authority and regardless of frontiers...'

⁹⁶ The Constitution of the Italian Republic (Italian: Costituzione della Repubblica Italiana) enacted by the Constituent Assembly on 22 December 1947 Freedom of expression Protected by the Art. 21 of the Italian Constitution, '...anyone has the right to freely express their thoughts in speech, writing, or any other form of communication.'

⁹⁷ Italian Court of Cassation, Section I Civil Ordinance 15 December 2020, n. 28646 (n6) at para 5.9 judgment

⁹⁸ Ibid. at para 5.10. referring to *NH v Lenford* (n1) and also European Court of Justice, Grand Chamber, C-163/10, September 6th 2011, *Patriciello*, at para 31).

⁹⁹ *NH v Lenford* (n1).

¹⁰⁰ Italian Court of Cassation, Section I Civil Ordinance 15 December 2020, n. 28646 (n6).

¹⁰¹ A. Tryfonidou, 'Homophobic Speech and EU Anti-Discrimination Law: The *NH* case' *Maastricht Journal of European and Comparative Law* 2020 Vol 27(4) p.1 – p.9.

¹⁰² Ibid. at 7.

¹⁰³ European Court of Human Rights, Application No 5493/72, December 7th 1976, *Handyside v United Kingdom*, at paragraph 49 states that Article 10 is applicable to 'ideas' that are favourably received or regarded as inoffensive or a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population...'

¹⁰⁴ Article 10 paragraph 2 provides that '[t]he exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of

Others critique the decision by the CJEU in *NH v Lenford* as ‘being lopsided [because it] embraced a surprisingly broad interpretation of the scope of EU anti-discrimination law at the expense of downplaying potential threats to freedom of expression’¹⁰⁵. In *NH*, in considering restrictions to Article 11, the CJEU placed stress on the importance of non-discrimination grounds contained in Article 21. The latter prohibits discrimination on any ‘ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, members of a national minority, property, birth, disability, age or sexual orientation’¹⁰⁶. Article 21 EUCFHR is a strong statement as it is ‘free-standing’ and explicitly contains sexual orientation as a protected ground of non-discrimination. This is in contrast to the equivalent provision in Article 14 European Convention of Human Rights (‘European Convention’) which is a ‘conditional’ right only. This means that whilst Article 14 prohibits discrimination in the enjoyment of any other European Convention rights, enforcement is dependent on another breach of human rights argument being made, although it does not actually require an independent proven breach of that right¹⁰⁷. Moreover, Article 14 of the European Convention, which was drafted in the 1950s, does not mention sexual orientation as one of the protected grounds. This has meant that the EctHR has had to engage in dynamic and imaginative interpretation of the European Convention under an extended line of case law in order to protect LGBT persons by including ‘sexual orientation’ within the grounds of ‘sex’ or ‘other status’¹⁰⁸. Given the explicit reference to sexual orientation as a ground of discrimination in EU law this is not necessary. This has led to commentators describing the European Union as engaging in a ‘rights revolution...’¹⁰⁹. In operating the proportionality balancing exercise between freedom of expression and protection from discrimination for LGBT persons and deciding in favour of the latter, the CJEU is moving one step further in its evolution of sexual orientation non-discrimination protection.

7. Case law analysis demonstrating more restrictive interpretations of non-discrimination law by the Court of Justice of the European Union (‘CJEU’)

Not all CJEU case law has adopted an expansive interpretation of non-discrimination provisions¹¹⁰. In *Parris v Trinity College Dublin*, it was ruled that Parris was unable to claim for ‘multiple or

others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary...’

¹⁰⁵ See J. Miller, ‘Op-Ed: “In a tight spot, the Court of Justice Delivers a Lopsided Judgment: *NH v Associazione Avvocatura per i diritti LGBTI — Rete Lenford*” April 2020 *Employment and Immigration and Human Rights* available at [Op-Ed: “In a tight spot, the Court of Justice delivers a lopsided judgment: *NH v Associazione Avvocatura per i diritti LGBTI — Rete Lenford*” by Jeffrey Miller - EU Law Live.](#)

¹⁰⁶ Article 21 EU Charter of Fundamental Human Rights of the European Union.

¹⁰⁷ Article 14 provides that “*The enjoyment of the rights and freedoms set forth in the European Convention on Human Rights and the Human Rights Act shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status*”.

¹⁰⁸ See for example European Court of Human Rights, October 22nd 1981, Application No 7525/76 *Dudgeon v United Kingdom* and European Court of Human Rights, July 24th 2003, Application no. 40016/98 *Karner v Austria*.

¹⁰⁹ For discussion, see M. Dawson, E. Muir, and M. Claes, ‘Enforcing the EU’s Rights Revolution; the Case of Equality’ *European Human Rights Law Review* 2012 Vol 3 p.276.

¹¹⁰ See Howard (n9) for discussion.

intersectional discrimination’ attempting to combine the grounds of sexual orientation and age discrimination¹¹¹. Trinity College Dublin only allowed payment of survivor’s pensions, providing the marriage or civil partnership had been entered into before the age of 60. Since same-sex civil partnerships were only introduced in Ireland in 2011, this meant that only the same-sex civil partner of an employee who was born after 1951, could claim a survivor’s pension. Although Mr Parris had been in a relationship for 30 years, he only got civil partnered after the Civil Partnership Act 2010 came into force in the Republic of Ireland, when Mr Parris was 63 and just after he had retired. Trinity College Dublin refused his request for his partner to have his survivor’s pension. Rejecting the Opinion of Advocate General Kokott who would have found ‘...indirect sexual orientation discrimination as well as direct age discrimination...’¹¹², the CJEU refused Parris’ claim as they would not allow a combination of sexual orientation and age discrimination¹¹³. Tryfonidou comments that the decision ‘demonstrates the [CJEU’s] failure to accept the reality of multiple discrimination’¹¹⁴. Howard gives the *Parris* case as an example of restrictive analysis by the CJEU of equality provisions and also cites as further evidence of this approach, restrictive case law from the CJEU concerning Muslim women wishing to wear veils in the workplace¹¹⁵. In *Achbita* the complainant challenged her employer’s rule that no one was able to wear ‘...visible signs of political, philosophical or religious beliefs...’¹¹⁶ Ultimately her refusal to obey resulted in her losing her employment. When interpreting Directive 2000/78 the CJEU found that the employer’s rule did not result in direct discrimination because all workers were treated equally¹¹⁷. No indirect discrimination was found either, as any undue burden could be supported by the legitimate aim of supporting the employer’s relationship with its customers¹¹⁸. Howard, when writing in 2018, subsequently stated that in areas of contention surrounding same-sex marriage and the wearing of headscarves that the ‘CJEU wants to tread carefully... and try to find a way of deciding these cases which can be supported by majority of Member States...’¹¹⁹ Ultimately, she concluded that the ‘hierarchy of discrimination grounds’ still existed and ‘that the protection against discrimination on some grounds is stronger than others’¹²⁰ with protection from sexual orientation discrimination being low down the list of protected grounds. She considered that the case law of the CJEU ‘contributed to this hierarchy rather than challenging it’¹²¹. The next section

¹¹¹ European Court of Justice, Grand Chamber, November 24th 2016, C-443/15 *Parris v Trinity College Dublin*.

¹¹² Howard (n9) at 69 discussing *Parris v. Trinity College Dublin* (n111), Opinion Advocate General Kokott paragraphs 110, 146, and 159.

¹¹³ See for discussion D. Lahuerta Shiek, S. Benedi and A. Zybyszewska, ‘On Uses, Mis-Uses and Non-Uses of Intersectionality before the Court of Justice (EU)’, *International Journal of Discrimination and the Law*, 2018-06, Vol 18 (2-3) p.82-p.103.

¹¹⁴ See Howard (n9) referring to A. Tryfonidou, ‘Awaiting the ECJ Judgment in Coman: Towards the Cross-Border Legal Recognition of Same-Sex Marriages in the EU?’, *EU Law Analysis* March 2017 available at [EU Law Analysis: Awaiting the ECJ Judgment in Coman: Towards the Cross-Border Legal Recognition of Same-Sex Marriages in the EU?](#)

¹¹⁵ Howard (n9) referring to European Court Justice, Grand Chamber, March 14th 2017, Case C-157/15 *Achbita v. G4S* and European Court of Justice, Grand Chamber, March 14th 2017, C-188/15 *Bougnaoui v. Micropole*

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.* The CJEU was interpreting Directive 2004/43 including the general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment or occupation.

¹¹⁸ *Ibid.*

¹¹⁹ Howard (n9) at p.74.

¹²⁰ Howard (n9) at p.74.

¹²¹ Howard (n9) at p.74.

investigates more recent case law from the CJEU demonstrating a more positive impact for LGBT persons.

8. CJEU judgments resulting in favourable outcomes for LGBT persons

More recently the CJEU has reached judgments resulting in favourable outcomes for LGBT persons. Of great prominence in this area is the high-profile case of *Relu Coman and Others v. Inspectoratul General pentru Imigrari and Others* ('Coman')¹²². In the area of family law the EU system defers to subsidiarity and the rights of member states to choose whether to legalise same-sex marriage¹²³. However, in *Coman* the CJEU extended free movement and residence rights to the non-EU citizen same-sex spouse of a migrant Union citizen¹²⁴. The CJEU determined that a non-EU citizen same-sex spouse must be granted the right to reside in Romania for more than 3 months, following the relocation of their EU citizen same-sex spouse to that Member State. This was the case even though Romania does not recognize same-sex marriages or partnerships domestically. Although the CJEU judgment in no way required EU states to introduced same-sex marriage in their own territory (but only to provide recognition – for the purpose of the grant of family reunification rights – to same-sex marriages contracted in other EU Member States), it has enhanced EU free movement rights for same sex couples. Tryfonidou comments on the inherent 'symbolic value' of *Coman*¹²⁵.

Further in another move forwards for LGBT rights before the CJEU, in *MB v Secretary of State for Work and Pensions* ('the *MB* case') the CJEU ruled that trans citizens are entitled to acquire state pension at the age of their acquired gender¹²⁶. The case concerned the requirement under the UK Gender Recognition Act 2004, for transpersons to annul their marriage before they would be granted a Gender Recognition Certificate in their new sex¹²⁷. This was pre same-sex marriage being 14ecognize in the UK in 2013. However, many individuals naturally did not wish to annul their marriages, and so did not obtain Gender Recognition Certificates. Consequently, as they were not 14ecognizes in their new sex, they were not able to claim their pension at the age of 60, the lower age given to women pre pension reform. In *MB* a complaint was made that the UK position contravened Article 4 of Directive 79/7 which prohibits all forms of discrimination on grounds of

¹²² *Coman* (n16).

¹²³ See for instance commentary on art 9 of the Charter of Fundamental Rights of the European Union which states that Member States do not have an 'explicit requirement to facilitate [same-sex] marriages'.

¹²⁴ *Coman* (n16) paragraph 56.

¹²⁵ A. Tryfonidou, 'The EU Top Court Rules that Married Same-Sex Couples can Move Freely between EU Member states as Spouses' Case C673/16 *Relue Adrian Coman Robert Clabourt Hamilton, Asocitia Accept v Inspectoratul general pentru Imigrari, Ministerul Afaceriilor Interne* *Feminist Legal Studies* 2019 Vol 27 (2) p.211-p.22.

¹²⁶ European Court of Justice, Grand Chamber, June 26th 2018, Case C-451/16. *MB v Secretary of State for Work and Pensions*.

¹²⁷ Section 4 Gender Recognition Act 2004 as discussed in the (see the *MB* case (n126) para 29). The Gender Recognition Act 2004 therefore provided that in order to obtain a full gender recognition certificate not only did strict medical conditions have to be met but that also that a married applicant had to have their marriage annulled by the court (ss 4(3) and 5, GRA 2004). This provision was only reformed following the Marriage (Same Sex Couples) Act 2013, Sch 5 of which amended s 4 of the GRA 2004 to provide that a full gender recognition certificate could be issued to a married applicant if their spouse consents.

sex as regards social security. The CJEU, although confining their decisions to non-discrimination in state pension age¹²⁸, and not transgressing on state competencies in family law, followed a progressive approach to transpersons¹²⁹. The CJEU determined in *MB* that transpersons are able to benefit from the progressive implementation of the principle of equality between sexes in matters of social security, therefore being able to acquire the state pension at the lower age of their acquired gender.

9. *NH v Lenford*: One step further towards levelling the hierarchy of protected rights

Howard argues that one of the reasons for the existence of a hierarchy of protected discrimination grounds, is that Directive 2000/78/EC, which prohibits religion, belief, disability, age and sexual orientation discrimination, only relates to employment, whereas Directive 2000/43/EC, prohibiting racial and ethnic origin discrimination, is much wider and not so restricted in its material scope¹³⁰. It is therefore of interest to the analysis in this piece how the CJEU justified their extensive interpretation of EU law in *NH v Lenford*¹³¹. In the latter case, the CJEU made reference to a wide range of legislation and case law concerning not only sexual discrimination in employment law but also the interpretation of Directive 2000/43 on equal treatment of persons irrespective of racial or ethnic origin¹³². Rather than treating sexual orientation discrimination as lower down the hierarchy than other types of discrimination¹³³, these were treated in a similar manner, with lessons to learn from one area translated to another. In *NH v Lenford*, the CJEU justified their expansive purposive approach by referring to the cases of *Runevič-Vardyn and Wardyn*¹³⁴ and *CHEZ Razpredelenie Bulgaria*¹³⁵, both of which concerned Directive 2000/43 on equal treatment of persons irrespective of racial or ethnic origin. In the former case the CJEU made a strong statement endorsing the importance of equality and the necessity of its wide-ranging interpretation. The CJEU stated that the Directive was ‘an expression, within the area under consideration, of the principle of equality, which is one of the general principles of European Union law, as recognised in Article 21 of the Charter of Fundamental Rights of the European Union, [thus] the scope of that directive cannot be defined restrictively...’¹³⁶ The subject matter of the case however, which concerned national rules about the spelling of a person’s surnames and forenames and the entering of these onto civil status certificates, only in a form governed by the spelling of the official national language, related to a situation outside of the scope of Directive 2000/43¹³⁷.

¹²⁸ *MB* (n126) paragraph 27.

¹²⁹ This reflects CJEU earlier case law concerning transpersons. See European Court of Justice, Grand Chamber, April 30th 1996, Case C-13/94 *P v S and Cornwall County Council*.

¹³⁰ Howard (n9) referring to Directive 2000/78/EC,2 establishing a general framework for equal treatment in employment and occupation prohibiting discrimination on the grounds of religion or belief, disability, age and sexual orientation and Directive 2000/43/EC,1 prohibiting racial and ethnic origin discrimination.

¹³¹ *NH v Lenford* (n1).

¹³² Directive 2004/43 on equal treatment of persons irrespective of racial or ethnic origin.

¹³³ As suggested by Howard (n6).

¹³⁴ European Court of Justice, Grand Chamber, May 12th 2011, C-391/09.*Runevič-Vardyn and Wardyn*.

¹³⁵ European Court of Justice, Grand Chamber July 16th 2015, C-83/14.*CHEZ Razpredelenie Bulgaria*.

¹³⁶ *Runevič-Vardyn and Wardyn* (n134) paragraph 43.

¹³⁷ *Ibid* Paragraph 44.

Ultimately however it was the principle of a wide interpretation of equal treatment between persons irrespective of racial or ethnic origin which was endorsed subsequently in the case of *CHEZ Razpredelenie Bulgari*¹³⁸. Once again reference was made to the fact that the ‘principle of equality, which is one of the general principles of EU law, as recognised in Article 21 of the Charter, ... cannot be defined restrictively...’¹³⁹ Consequently, the facts of the case, which concerned the installation of electricity meters, were found to fall within the wide scope of the Directive. The subject matter of the dispute concerned a complaint that the electricity meters were installed at a height of between six or seven meters in the area of Dupnista (Bulgaria) whereas in other areas of the country this was a height of 1.7 meters. The residents of Dupnista argued that this meant they were overcharged as they were unable to check their consumption. Discrimination was alleged as Dupnista was primarily a Roma town. Ultimately the CJEU determined that such a measure would constitute direct discrimination¹⁴⁰. Both cases were given as examples by the CJEU in *NH*, militating against ‘restrictive’ interpretations of equality provisions and justifying a wider purposive approach to sexual orientation discrimination¹⁴¹. Sexual orientation discrimination was not seen as lower down the hierarchy than other protected rights.

10 Brexit and Trade and Cooperation Agreement

As a British author, this article also considers the position following Brexit. For a wider audience the points are also relevant as they illustrate how far EU legislation and CJEU judgments have forced Member States to protect LGBT rights. Following Brexit, all EU law already incorporated into UK legislation will be retained¹⁴². New EU legislation and judgments from the CJEU will no longer apply automatically in the UK. In certain constrained ways under the terms of the TCA the EU and the UK will arguably continue to maintain limited influence over each other in the area of LGBT non-discrimination in employment¹⁴³. Three points are worth noting here. Firstly both parties have agreed to uphold ‘shared values, principles of democracy and the rule of law, and respect for human rights...’¹⁴⁴ Whilst the European Convention is not specifically mentioned, it would seem to come under the reference to international human rights treaties made. Any judgments of the EctHR concerning discrimination against LGBT persons would therefore apply to both the UK and the EU. However, where arguably the EU is developing case law exceeding the protections from the EctHR this would not take automatic effect in the UK.

Secondly, in relation to ‘labour and social levels of protection’ more specifically defined to include – of relevance to this piece – ‘(a) fundamental rights at work and ...(c) fair working conditions

¹³⁸ *CHEZ Razpredelenie Bulgaria* (n135).

¹³⁹ *Ibid.* paragraph 42.

¹⁴⁰ *CHEZ Razpredelenie Bulgaria*, (n135) unless being capable of being objectively justified by the intention to ensure the security of the electricity transmission network and the due recording of electricity consumption.

¹⁴¹ *NH v Lenford* (n1).

¹⁴² European Union (Withdrawal Act) 2018.

¹⁴³ Trade and Cooperation Agreement between the European Union and the UK.

¹⁴⁴ *Ibid.* Article LAW.GEN.3: Protection of human rights and fundamental freedom.

and employment standards¹⁴⁵, the parties commit to a non-regression clause. The parties agree not to 'weaken or reduce in a manner affecting trade or investment between the Parties, [their] labour and social levels of protection below the levels in place at the end of the transition period...' ¹⁴⁶ In addition, the parties affirm their commitment to promoting and respecting core labour standards of relevance to this piece inducing 'elimination of discrimination in respect of employment and occupation'¹⁴⁷ as further defined in International Labour Organisation documents¹⁴⁸. It remains to be seen what effect these provisions will have in reality. The point in time for judgment of non-regression to be measured is as at the end of the transition period 31 December 2020. Even then much reference is given under the agreement in the TCA to the 'right of each Party to set its policies and priorities'¹⁴⁹ and to 'exercise reasonable discretion and make bona fide decisions'¹⁵⁰. In order for the TCA to have any effect the alleged regression must affect 'trade or investment between the parties'¹⁵¹. It is unclear when this test would be met and it is difficult to envisage that differences in LGBT non-discrimination laws would meet this seemingly high and yet to be defined standard. In relation to both the non-regression clause and commitment to ILO standards there is a special rule on dispute settlement which requires the parties to refer the matter to a panel of experts¹⁵². Ultimately the panel's decisions are toothless as all they can do is make recommendations in their report. However a negative judgment could result in political impact. Further the parties have agreed that where the responding party 'chooses not to take any action in conformity with the panel of experts report... they may use the remedies authorised under Article Inst. 24'¹⁵³. This includes the ability of the winning party to request compensation or suspension of obligations¹⁵⁴.

Thirdly, although the TCA recognises the 'right of each Party to determine its future policies and priorities with respect to labour and social control...' ¹⁵⁵ the TCA also refers to the possibility of 'rebalancing' in the event of significant divergences following future developments in labour law¹⁵⁶. The latter however is subject again to the same special rules on arbitration and a different (higher) threshold to show that divergence affects trade or investment resulting in 'significant divergences.../[which have change[d] the circumstances that have formed the basis for the conclusion of this Agreement'¹⁵⁷. If this then results in a 'material impact on trade or investment'

¹⁴⁵ Trade and Cooperation Agreement Labour and social standards Article 6.1: Definition 1. For the purposes of this Chapter, "labour and social levels of protection" means the levels of protection provided overall in a Party's law and standards, in each of the following areas: (a) fundamental rights at work; (b) occupational health and safety standards; (c) fair working conditions and employment standards; (d) information and consultation rights at company level; or (e) restructuring of undertakings.

¹⁴⁶ Trade and Cooperation Agreement 6.2.

¹⁴⁷ Trade and Cooperation Agreement Article 8.3: Multilateral labour standards and agreements Article 8.3. Paragraph 2(d).

¹⁴⁸ Ibid. referring to International Labour Constitution and International Labour Declaration on Fundamental Principles and Rights at Work and its Follow-Up adopted at Geneva on 18 June 1999.

¹⁴⁹ TCA Article 6.2: Non-regression from levels of protection para 1

¹⁵⁰ TCA Article 6.2: Non-regression from levels of protection para 3.

¹⁵¹ Article 6.2: Non-regression from levels of protection para 2.

¹⁵² Article 9.2: Panel of experts.

¹⁵³ TCA Article 9.3: Panel of experts for non-regression areas paragraph 3.

¹⁵⁴ Article INST.24: Temporary Remedies para 2 and 3

¹⁵⁵ Article 9.4 Rebalancing para 1

¹⁵⁶ Trade and Cooperation Agreement Article 9.4 Rebalancing.

¹⁵⁷ Ibid. Para 1

the Parties are then able to take 'appropriate rebalancing measures to address the situation... [although these measures are] restricted to their scope and duration to what is strictly necessary and proportionate to remedy the situation'¹⁵⁸. Once again it is difficult to envisage that future developments in LGBT non-discrimination laws would meet the yet undefined but seemingly even higher standards required to trigger the rebalancing clause. So therefore whilst the TCA does offer some limited opportunity for continuing EU and UK influence on each other this is subject to many constraints.

11. Conclusion

In *NH v Lenford* the CJEU determined that homophobic statements made in the course of a radio interview contravened relevant non-discrimination in employment law provisions in EU legislation¹⁵⁹. This was despite the fact that these statements were made outside of a recruitment campaign and with no job offer having been made. What was of importance was that the statements were made by a person perceived to have influence on recruitment policy, which could prejudice applicants in deciding against future job applications¹⁶⁰. Compensation was also payable to a non-profit representative agency, therefore also widening the group of applicants who could bring cases¹⁶¹. The Italian Court of Cassation implemented the CJEU preliminary reference determining that there was a link between the statements made in the radio interview and employment, despite no ongoing recruitment campaign¹⁶². They also, following the CJEU, determined that freedom of expression guaranteed by the Italian constitution, had to be balanced against other rights, in this case protection from discrimination on the prohibited grounds listed, and that the latter prevailed¹⁶³. It is argued that *NH v Lenford* is one further step in the continuing evolution of sexual orientation discrimination before the European Union, following extensive furthering of EU legislative tools including the EUCFHR (where sexual orientation is specifically listed as a protected ground of discrimination)¹⁶⁴ and a directive (Directive 2000/78) prohibiting discrimination on the basis of sexual orientation. This expansive purposive approach adopted by the CJEU in *NH v Lenford* corresponds with that of the CJEU in other areas, although strict respect for member state competencies in family law is maintained¹⁶⁵.

Other authors argue that a hierarchy of protected characteristics exists, with LGBT discrimination least protected¹⁶⁶. Analysis of the reasoning used by the CJEU in the *NH v Lenford* case, demonstrates that in making an extensive interpretation of non-discrimination provisions, the CJEU drew upon a wide range of case law to support their position¹⁶⁷. Examples were taken from

¹⁵⁸ Ibid Para 2.

¹⁵⁹ *NH v Lenford* (n1).

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

¹⁶² Italian Court of Cassation, Section I Civil Ordinance 15 December 2020, n. 28646 (n6).

¹⁶³ Ibid.

¹⁶⁴ See Charter of Fundamental Rights of the European Union 2000/C 364/01 Article 21(1).

¹⁶⁵ See *Coman* (n16) and *MB* (n126).

¹⁶⁶ Howard (n9).

¹⁶⁷ *NH v Lenford* (n1) referring to *Runevič-Vardyn and Wardyn* (n134) and *CHEZ Razpredelenie Bulgaria* (n135).

the area of non-discrimination on the basis of race and ethnic groups and these were held to justify a purposive approach in the area of sexual orientation discrimination¹⁶⁸. The author would suggest that it is difficult to maintain the argument that a hierarchy of protected grounds still exists. This methodology, of borrowing precedents from a wide area of protected characteristics, will also be of use in assisting the CJEU in further development of non-discrimination on the basis of sexual orientation. Following Brexit, whilst under the terms of the European Union (Withdrawal Act) 2018, all existing EU law will be retained in UK domestic legislation¹⁶⁹, future EU legislation and judgments from the CJEU will no longer have immediate effect in the UK. Under the terms of the TCA provisions relating to human rights¹⁷⁰, non-regression clause in relation to labour rights¹⁷¹ and rebalancing provisions in respect of future divergences in labour law¹⁷² lead to the possibility of the UK and EU continue to affect each other in the area of LGBT non-discrimination law. In practice however there are significant hurdles to be overcome before arbitration or ultimately suspensions or fines are triggered, including requiring effect on 'trade or investment between the parties'¹⁷³, as regards non-regression, and 'significant divergence' in labour law leading to a 'material impact on trade or investment', as regards rebalancing¹⁷⁴. Going forwards UK citizens will no longer be able to benefit from such interventions from the CJEU as seen in *NH v Lenford*¹⁷⁵, The EU will have limited effect on the UK, who will have to determine their own laws in this area.

¹⁶⁸ *NH v Lenford* (n1).

¹⁶⁹ European Union (Withdrawal Act) 2018.

¹⁷⁰ TCA Article LAW.GEN.3: Protection of human rights and fundamental freedom.

¹⁷¹ Trade and Cooperation Agreement 6.2.

¹⁷² Trade and Cooperation Agreement Article 9.4 Rebalancing.

¹⁷³ Article 6.2: Non-regression from levels of protection para 2.

¹⁷⁴ Trade and Cooperation Agreement Article 9.4 Rebalancing.

¹⁷⁵ *NH v Lenford* (n1).